Supreme Court of the United States,

OCTOBER TERM, 1904.

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JAMES H. McKENNEY,
Clerk

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. THE NEW AMSTERDAM GAS COMPANY,

Plaintiff-in-Error,

against

THE STATE BOARD OF TAX COMMISSIONERS.

No. 78.

Error to the Supreme Court of the State of New York.

BRIEF FOR PLAINTIFF-IN-ERROR.

ELIHU ROOT,
FRANK H. PLATT,
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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief for Plaintiff-in-Error.

Statement of the Case.

This case involves the constitutionality of the so-called Special Franchise Law of the State of New York (chapter 712, Laws of 1899), and involves the same questions presented in the cases Nos. 74, 75, 76 and 77 on the docket of this Court. The statute in question is set forth in the statement contained in the brief for the Consolidated Gas Company, and need not be here repeated.

This relator is a corporation formed in 1897 by the consolidation of the Equitable Gas Light Company of New York, the New York and East River Gas Company and the New Amsterdam Gas Company (p. 190, finding 2). The special

franchises assessed against the relator are the franchises to lay and maintain gas-pipes and mains in the streets of New York City granted to the Equitable Gas Light Company and to the East River Gas Company of Long Island City (p. 190, finding 4). The franchise of the Equitable Gas Light Company was granted by ordinance of the Common Council of the City December 26, 1882, and appears at pp. 9 to 13 of the record. This franchise vested in the relator by the consolidation of the Equitable Gas Light Company with the relator (p. 177). The franchise of the East River Gas Company of Long Island City was created by chapter 338 of the Laws of 1892, and appears at p. 14 of the record and again at p. 183. The East River Gas Company of Long Island City continues its corporate existence, its entire stock being owned by the relator (p. 47), the stock of said company having been owned prior to the consolidation by the New York and East River Gas Company (p. 27). The special franchise of the East River Gas Company of Long Island City was not separately assessed against that company, but was assessed by the defendants-in-error in the name of the relator, since the report of the relator to the State Board included the business of the East River Gas Company of Long Island City. The special franchise of the East River Gas Company of Long Island City provides that the East River Gas Company of Long Island City shall pay annually into the treasury of The City of New York three per centum of its gross receipts from gas furnished by it to private and public buildings in The City of New York through mains laid by it, as therein authorized, under the streets or avenues of such City. It was proved that the East River Gas Company had paid into the treasury of the City, under this law, from 1894 to 1899, $76,177.15 (p. 46). The report of the relator showed that its payments on gross earnings on account of the franchise of the East River Gas Company of Long Island City in the year preceding the assessment amounted to $16,000 (p. 21).

The relator duly filed all reports required by law or by the State Board (p. 190, finding 6, Reports, at pp. 7-26).

On March 6, 1900, the State Board fixed the assessment of relator's special franchise at $5,561,750. On March 29, 1900, the relator appeared before the Board and filed a written statement specifying the grounds of its complaint (p. 191, Findings 9, 10; Complaint, at pp. 26–31). Thereafter the Board fixed the final assessment of relator's special franchises at $437,433 in the Borough of Queens and $3,989,182 in the Borough of Manhattan—a total of $4,426,615. This final valuation was certified to the Commissioners of Taxes and Assessments of The City of New York, and by them entered in the assessment-rolls of said City (p. 191, Findings 11, 12).

Thereupon, on July 13, 1900, this proceeding was instituted by a writ of certiorari (p. 13) granted upon a verified petition (p. 3). The State Board filed its return (p. 34). The case was referred to Hon. Robert Earl, as Referee (p. 43), and was heard before the Referee with the cases of the Consolidated Gas Company, the Metropolitan Street Railway Company and a number of other cases. The report of the Referee, consisting of findings of fact and conclusions of law, appears at pages 190 to 195 of the record. This report confirmed the assessment against relator, except that it reduced the same 33 per cent. to equalize it with the assessment of other real property in The City of New York. The assessment as so reduced, viz., $293,081 in the Borough of Queens and $2,672,751.94 in the Borough of Manhattan, was confirmed by *pro forma* decision of the Supreme Court (pp. 232–240). To the report of the Referee the relator filed exceptions (p. 230), and also to the decision of the Special Term (p. 238). The order of the Special Term was reversed by the Appellate Division of the Supreme Court upon a question of law arising under the State Constitution (p. 243). The order of the Appellate Division was reversed and that of the Special Term affirmed by the Court of Appeals (p. 1), and the record remitted to the Supreme Court in Albany County. Upon this remittitur the Supreme Court entered the judgment of the Court of Appeals as its judgment June 22, 1903 (p. 270). To review the

decision of the Court of Appeals, this writ of error was taken to the Supreme Court of the State of New York.

SPECIFICATION OF ERRORS.

The errors assigned upon which plaintiff-in-error will rely are as follows:

1. Error in declining to hold that the act of the Legislature of the State of New York, approved May 26, 1899 (chapter 712, Laws of 1899), entitled "An Act to amend the Tax Law in relation to the Taxation of Public Franchises as Real Property," in so far as it authorizes the assessment imposed by the State Board of Tax Commissioners on March 20, 1900, upon the franchises of the New Amsterdam Gas Company, deprives the relator of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

2. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, denies to said relator the equal protection of the laws, in contravention of the 14th Amendment to the Constitution of the United States.

3. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, impairs the obligations of the contracts under which the relator holds its special franchises, in contravention of section 10, article 1, of the Constitution of the United States.

The assignment of errors appears on page 274 of the record.

ARGUMENT.

POINT I.

It affirmatively appears that the Federal questions were duly asserted in the State courts, were decided adversely to the plaintiff-in-error by those courts, and that this Court has jurisdiction.

It was contended by plaintiff-in-error throughout the course of this proceeding in the State courts that the statute in question violates the Federal Constitution, and that the assessment is invalid, in that the arbitrary taxation of relator's special franchises thereunder is a deprivation of property without due process of law and a denial of the equal protection of the laws, and in that the exaction of additional taxes on account of relator's special franchises impairs the obligation of the contracts under which the said special franchises are held.

It appears conclusively by the opinions of the Referee and of the Court of Appeals that these Federal questions were asserted in the State courts and were decided adversely to the relator by those courts. The Referee devotes a separate opinion to the alleged violation of the provision of the Federal Constitution forbidding any State to pass a law impairing the obligation of contracts (pp. 209-218). The opinion of the Referee (p. 229, par. 4) also refers briefly to the contentions of the relators that they are deprived of their property without due process of law and denied the equal protection of the laws. The opinion of the Court of Appeals discusses at some length the contentions and arguments presented in reference to the contract clause of the Federal Constitution (p. 301), and refers without discussion to the further contention of the relators that due process of law was not observed in the taxation of their property.

The Referee's report contains as a conclusion of law (p. 195): "1. Chapter 712 of the Laws of 1899 is a valid and

constitutional enactment * * *." While there is not in this report any specific reference to the United States Constitution, the opinion of the Referee, as above indicated, expressly refers to the violations of the Federal Constitution urged by the relators, showing thereby that the first conclusion of law as above quoted is intended to comprehend the questions arising under the Constitution of the United States, as well as that of the State. The findings and conclusions of the Court at Special Term were identical with those of the Referee, the decision of Special Term containing a conclusion that the Special Franchise Law is "a valid and constitutional enactment." To this conclusion of the Referee, as well as the identical conclusion in the decision of Special Term, this relator duly excepted (pp. 230–239).

It is now well established that the jurisdiction of this Court sufficiently appears where the opinions of the State courts show that the Federal constitutional questions were asserted in the State courts, and adversely decided.

Philadelphia Fire Ass'n vs. *New York*, 119 U. S., 110, 116.

Sayward vs. *Denny*, 158 U. S., 183.

Land and Water Co. vs. *San Jose Ranch*, 189 U. S., 177, 179.

Dole M'f'g Co. vs. *Hyatt*, 125 U. S., 46, 53.

Walter A. Wood Co. vs. *Skinner*, 139 U. S., 293, 295.

Mallett vs. *North Carolina*, 181 U. S., 589, 592.

POINT II.

A legislative enactment which requires or authorizes the taxation of a certain class of property upon the basis of a sum arbitrarily fixed by the assessing officers, without reference to the value of the property, constitutes a deprivation of property without due process of law and a denial of the equal protection of the laws.

This point is identical with Point II. presented in the brief for the Consolidated Gas Company, No. 77, and reference is made to that brief for the authorities and argument in support of this point.

POINT III.

The State Board of Tax Commissioners made no assessment or valuation of the relator's special franchises, but fixed an arbitrary sum as the basis upon which these special franchises should be taxed, and the Court of Appeals has held that the acts and determinations of the State Board are valid and authorized by the special franchise tax law.

The discussion of the facts and evidence under Point III. of the brief for the Consolidated Gas Company in No. 77 applies equally to this relator. The evidence material to the discussion of this point is identical with the evidence in the Consolidated Gas Company record, the same evidence having been incorporated in the record of this company by stipulation (pp. 44, 50).

POINT IV.

This statute violates the obligations of the contracts under which the special franchises assessed against the relator are held.

One of the franchises assessed against this relator is that of the East River Gas Company of Long Island City. This franchise was acquired under chapter 338 of the Laws of 1892. That act imposed upon the owner of said franchise an annual payment to The City of New York of three per cent. of the gross receipts derived from the operation of this franchise. The provisions of chapter 338 of the Laws of 1892 constitute a contract with the East River Gas Company of Long Island City. The obligations of that contract are violated by the Special Franchise Tax Law in contravention of the provisions of the Constitution of the United States.

This point is exhaustively presented and argued in the brief for the Metropolitan Street Railway Company and other street railway companies in Nos. 74, 75 and 76, and reference is made to that brief for the authorities and argument in support of the above point.

The main propositions upon which this ground for reversal rests are as follows:

First—The requirement that a percentage of gross receipts should be paid was the imposition of a tax.

1. The requirement of payments computed upon gross receipts is the customary way of taxing franchises which in their nature are as a rule incapable of separate valuation as a basis of apportionment, and such impositions in a great number of cases have been dealt with by this Court as taxes.

2. This payment was regarded as a tax by the State of New York and the legislation now in question dealt with it as a tax.

(a) The message of Governor Roosevelt, upon which this legislation was had, returned a preceding and imperfect bill for further action by the Legislature, with the following reasons for action:

"Furthermore, the bill before me fails to take account of the fact that in a very unequal and irregular way many corporations do already pay a certain, though usually an utterly inadequate sum in taxes. Some pay nothing at all to the local municipalities; but others pay sums varying from one to five per cent. on their gross earnings. The amounts have been determined in the most haphazard manner and bear no proportion whatever to the value of the franchises or to their earning capacity. It is obviously unjust, when introducing a system under which we believe that these franchises will for the first time be fully and fairly taxed according to their respective values, not to allow for this existing and inequitable taxation. Accordingly it should be provided that from the sum assessed by the State authorities as the tax which a corporation must pay because of its local franchise, there shall be deducted the amount already annually paid by it to the locality for such franchise. In no other way is it possible to tax these corporations with uniformity and equity. It is contended by the advocates of the bill that in reaching the value of the franchise under the new law the amount thus paid away in taxes must be allowed for and deducted anyhow, but it is not certain that this would be done, and in any event the principle should be definitely established in the law itself. There can be no possible opposition to putting it in the law by any man who is anxious to tax corporations as other property is taxed, and who believes that this end can be attained by taxing them as realty. Either by taxing them as realty we shall tax them at their full value, or we shall not; if, as we hold, the former is the case, it would be unjust to tax them for more than their full value, and this would happen were not these existing taxes deducted."

(*b*) The statute of which we complain provided for the deduction of the amount of this tax based upon gross receipts from the amount of the newly imposed tax, as follows:

> "Section 46. Deduction from special franchise tax for local purposes.—If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town or village in which the tangible property is located, it shall appear that the person, copartnership, association or corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association or corporation, which payment was *in the nature of a tax*, all amounts so paid for the exclusive use of such city, town or village, except money paid or expended for paving or repairing of pavement of any street, highway or public place, shall be deducted from any tax based on the assessment made by the State Board of Tax Commissioners for city, town or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town or village purposes * * *" (Laws of 1899, chap. 712).

Second—The provision imposing the tax of three per cent. of gross earnings per annum as one of the terms on which the East River Gas Company of Long Island City accepted its charter and invested its capital in a plant for public service, when accepted, constituted a contract.

> Gordon *vs.* Appeal Tax Court, 3 How., 133.
> Union Bank *vs.* The State, 9 Yerg., 490.
> Farrington *vs.* Tennessee, 95 U. S., 679, 689.
> Attorney General *vs.* Bank of Charlotte, 4 Jones' Equity (N. C.), 368.
> Detroit *vs.* Detroit Citizens' R'y Co., 184 U. S., 368.

Third—The statute imposing a further tax upon the very thing upon which the amount of tax had been fixed by the accepted charter, impairs the obligation of that contract.

Conclusion.

It is submitted that the special franchise act in question deprives the relator of its property without due process of law, denies to relator the equal protection of the laws, and impairs the obligation of the contract under which its special franchise is had; and that the judgment of the Court below should, therefore, be reversed.

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